2002 No. 329-W DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

1 Edith Latchman

2. George Griffith

Plaintiffs/Applicants

-and-

1. Majorie French

2. Anthony French

3. Patrick Alphonso

Defendants/Respondents

Mr. Gentle Elias for Plaintiffs/Applicants

Ms. Jamela A. Ali for First and Second Defendants/ Respondents

No appearance for the third defendant

RULING

The present action was filed in May 2002 by the Plaintiffs/Applicants and on the 30th March 2005 the parties entered a consent order for the sale of the property to the plaintiffs for the sum of $5,200,000 upon certain terms and conditions including that the plaintiffs pay the entire purchase price on or before the 1st February 2006, with an additional grace maximum period of 3 months to complete, that is 1st May 2006, and upon failure of the

plaintiffs to complete the sale as aforesaid "the full and undisputed ownership of the property shall revert to the 1st and 2nd defendants, free of any right, title or interest or claim by plaintiffs".

It is not in dispute that the plaintiffs/applicants failed to complete payments before the expiration of the 3 month maximum grace period of 1st May, 2006 and further that the plaintiffs/applicants breached their undertaking to give up possession to the 1st and 2nd defendants after the 1st May 2006. The plaintiffs/applicants did not pay the entire purchase price before 1st February 2006 as stipulated by the order or before the maximum grace period up to the 1st May 2006, but instead offered by way of letter dated 15th May 2006 to pay the sum of $550,000.

After the breach of the 30th March 2005 order, the defendants/respondents then caused a summons with an affidavit in support to be filed in July 2006 claiming an order to enforce the terms of the previous order , that is, the term that "failure of the plaintiffs to complete before the expiration of the grace period the property shall revert to the defendants and further that the defendants be at liberty to re-enter and retake possession of the said property".

On 9th June 2009 the Honourable Justice Dawn Gregory Barnes granted the said orders, which are now the subject of an appeal.

The plaintiffs/applicants have filed the application herein for a stay of execution of Justice Barnes order of 9th June 2009, claiming in their affidavit in support:

(1) That there was delay in entering the consent order of 2005 and so they could not comply with it. The order was entered on the 9th January 2006.

However, the plaintiffs/applicants had until 1st May 2006 to comply.

The plaintiffs/applicants have alleged delay but have not given any evidence of their attempt to enter the order, but most importantly, they have not shown in what way the delay prejudiced them, when in fact they were present in court when the orders were made and consented to the terms and conditions therein. The plaintiffs/applicants knew what they were required to do before the order was entered. So that excuse must fail on the grounds that it is not a reasonable excuse in the circumstances.

The plaintiffs/applicants' reference to acquiring a loan by way of mortgage is not supported by any evidence or documents in relation thereto. In any event, if the plaintiffs/applicants required time to access a loan then they could have approached the courts for an extension of time within which to complete the sale, with evidence of their documentation from the bank. The defendants/respondents deny that they waived the time limits.

The plaintiffs/applicants did not comply with the terms of the 30th March 2005 order, and in addition requested after the grace period that the conveyance be put into the names of third parties contrary to the said order.

There were strict time limits set by the consent order which were not altered or extended by any court order, and therefore the plaintiffs/applicants must be bound by the terms of the order.

The fact that the plaintiffs/applicants claim that they have done renovations and expended money on the property is not relevant in this case, and neither is this court called upon to determine that issue.

The Honourable Justice Barnes saw it fit to enforce the terms of the order given by Justice C. La Bennett and I can find no reason why the Judge ought not to have done so.

The reasons given by the plaintiffs/applicants are frivolous, without merit and do not constitute any proper grounds upon which the order ought to be stayed. The plaintiffs/applicants have not shown any serious effort to comply with the two court orders, but have delayed the execution of the orders, and have thereby deprived the defendants/respondents of the use and enjoyment of their property since 2006, from the date the order was entered, and before that from March 2005 when the consent

order was made. More than a year was given for the order to be complied with.

I have no evidence before me that there was any communication by the plaintiffs/applicants to the defendants/respondents that they needed more time to access a loan, and that the defendants/respondents agreed to an extended time. It appears that the plaintiffs/applicants have deliberately sought to exclude the defendants/respondents from the property while they the plaintiffs/applicants enjoy the fruits and the profits of the property, none of which are received by the defendants/respondents.

As to whether the plaintiffs/applicants have an arguable appeal or whether the appeal has any prospects of success, from the plaintiffs/applicants' own evidence, the second plaintiff/applicant had sworn in 2000 that he was a licencee and caretaker of the property and that the first named defendant is the transported owner. Since it is not in dispute that the terms of the order of the 30th March 2005 have not been complied with by the plaintiffs/applicants, I cannot find any merit in the plaintiffs/applicants' contention that the appeal has prospects of success.

In the local case of **Mohamed Nazir v Attorney General**, CA No. 30/2002, it was stated by the then Chancellor Madam Justice Desiree Bernard that:

> "While it is not our remit to determine the success or failure of the appeal at this time, in order to enable us to exercise our discretion we need to consider whether there is an arguable appeal."

On the issue as to whether the plaintiffs/applicants are entitled to a stay of execution of the order of the Honorable Justice Barnes, in the case of **Linotype-Hell Finance Ltd v Baker** (1992) 4AER 887, Staughton LJ stated that an arguable appeal must be shown in order to grant a stay of execution. In this case a stay of execution was refused in respect of a delivery up of equipment since it was stated that it was not the property of the party applying for a stay, and he had no right or title to it.

It seems therefore that before an appellant can be deemed to be entitled to a stay he must first convince the court that he has an arguable appeal. I find for the reasons stated above that there is no arguable appeal, and furthermore the first named plaintiff/applicant being a licencee and caretaker cannot have any right or title to the property, and is therefore not entitled to a stay of the order.

In the **Linotype** case (supra) Staughton LJ put the test for granting a stay of execution this way:

> "It seems to me that if a defendant can say that without a stay of execution he will be ruined and that he has an appeal

which has some prospect of success, that is a legitimate ground for granting a stay of execution."

The **Linotype** principle that a stay of execution ought to be granted if the appeal has some prospect of success was applied by Williams JA in the Barbados case of **Scotland District Association v Attorney General** (1996) 53 WIR 66 at 71 where the application for a stay was refused. Williams JA further stated at page 71 that "the onus is on the appellant to show that the appeal has some prospects of success."

It is my view that the plaintiffs/applicants have not advanced any reasons that show that their appeal has prospects of success. Assuming that the plaintiffs/applicants' appeal has any prospect of success the plaintiffs/applicants must go further and show why the stay should be granted.

The grounds the plaintiffs/applicants must show in order to convince the Judge to grant a stay is some special ground why the refusal of the stay would be prejudicial to them. I can find no special grounds disclosed in the application herein why a stay of execution of the order should be granted, since it appears that the plaintiffs/applicants have deliberately kept the defendants/respondents out of possession of their property. No special circumstances have been put forward by the plaintiffs/applicants in their affidavit.

In the case of the **Annot Lyle** (1886) 11 PD 114, it was held that a stay of execution pending an appeal would not be granted unless special circumstances are shown by affidavit.

In **Monk v Bartram** (1891) 1 QBD 346, Lord Esher MR. explained what would constitute special circumstances:

> "It is impossible to enumerate all the matters that might be considered to constitute special circumstances, but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of the evidence, or that there was no evidence to support it, are not special circumstances on which the court will grant a stay of execution."

The plaintiffs/applicants have shown no bona fide claim to the property throughout these proceedings and the order for ownership and possession of the property in favour of the transported owner cannot ruin the plaintiffs/applicants, and considerations such as the judge misdirected herself, the verdict was against the weight of the evidence, or that there was no evidence to support it, are not special circumstances on which the court can grant a stay of execution. These are not special circumstances according to the legal authorities.

In **Vaswani Trading Company v Savalekh and Co.** (1972) 12 SC 77 at page 82, the court held that special circumstances would involve:

> "a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the Court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal, or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return of the status quo."

The plaintiffs/applicants have not shown any special or collateral circumstances why the Transport owner should not enjoy the fruits of her judgment, that is, ownership and possession of her property. The plaintiffs/applicants were given more than ample opportunity to carry out the terms of the order to which they consented and they have given no reasonable grounds why they have not executed the order according to the terms stated therein. The defendants/respondents applied for and obtained an order from the Honorable Justice Barnes on 9th June 2009 giving them immediate possession and I can find no fault with her Honour's order.

One example of a special circumstance is that the appeal would not be rendered nugatory if a stay is refused. In **Polini v Gray**

(1873) 12 CHD 438, Jessel MR. referred to the principle as follows at page 443:

> "It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlines all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success."

Cotton LJ at page 446 stated:

> "…the Court, pending an appeal to the House of Lords, suspends what it has declared to be the right of one of the litigant parties. On what does it do so? It does so on this ground, that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, <u>if there is a reasonable ground of appeal,</u> and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights."

In the passage quoted above it is important to make note of the words underlined for emphasis "<u>if there is a reasonable ground of appeal</u>". The appellant must prove that there is a reasonable ground of appeal (**Scotland District Association v Attorney**

General (1996) 53 WIR 66 at 71 where Williams JA stated that "the onus is on the appellant to show that the appeal has some prospects of success."), and then the Court will look to see if it ought to interfere and suspend the right of the party who has thus far established his rights.

It is without doubt that the defendants/respondents have established their rights to the property, all the evidence points to this being a certainty, and the first Court Order was granted to ensure that the defendants were not deprived of their property unless and until certain conditions were fulfilled, and it is also quite clear that the plaintiffs/applicants have not fulfilled those conditions. Neither have they established any competing rights to the property and the second Court Order was granted giving the defendants/respondents immediate possession. Thus it cannot be said, in this case, that the appeal of the plaintiffs/applicants would be rendered nugatory. The plaintiffs/applicants have no bona fide claim to the property.

In **Polini v Gray** (supra) Jessel MR. said at page 444 in referring to the refusal of the order for a stay:

> "It is not every case in which the Court or Judge should interfere. It is not to be said that when a party litigant has succeeded in two Courts he is to be in the same position as if he had never succeeded at all. In my opinion it requires a stronger and more special case to induce the Court to

interfere against him on behalf of the other party than would have been required if there had been any trial of the action."

In **Wilson v Church** (No. 2) (1878) 12 CHD 454 Cotton LJ at page 458 after referring to the general rule of not rendering an appeal nugatory, went on to say:

"If there had been any case made by the plaintiff (unsuccessful party) that this appeal was not bona fide, that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position…"

From the facts of this case and the affidavit evidence the plaintiffs/applicants are clearly trying to stall the process of justice. They have no claim to the property and they entered a consent order whereby they agreed upon the terms therein by which they would acquire the property. There is no evidence that the plaintiffs/applicants have any legal right to the property which is owned by the defendants and the filing of the appeal will only serve to delay the defendants/respondents from enjoying their right of possession of the property. It amounts to an abuse of the process of the court and is aimed solely to allow the plaintiffs/applicants to remain in possession when they have no right to do so.

For these reasons, the stay of execution is hereby refused.

Costs to the first and second respondents in the sum of $75,000.

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Justice Diana Insanally

14th June 2010